

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-221026

DATE: February 6, 1986

MATTER OF: Lioncrest Ltd., Inc.

DIGEST:

1. Determination that bid was nonresponsive because unit prices for indefinite-quantity portion of contract were not submitted with bid was proper because such unit prices are necessary to set material terms of the contractor's obligation. Since these prices are material, the failure to submit them cannot be waived or corrected after bid opening.
2. Question regarding bidder's status as small business under total small business set-aside for maintenance services is not matter of bid responsiveness since question does not relate to bidder's commitment or obligation to provide required services in conformance with material terms of solicitation, but rather to bidder's status and eligibility for award. Thus, contracting agency was correct in permitting agency to correct erroneous certification indicating bidder was large business in order to reflect bidder's actual status as small business.
3. Where protester supplements its protest with a new ground of protest in its response to the contracting agency report more than 10 days after the basis for the new argument should have been known, the new ground is untimely.
4. A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the integrity of the competitive bidding system.

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5. Allegation that bid was rejected because of bias fails because proper application of procurement principles requires bid to be rejected as nonresponsive.

Lioncrest Ltd., Inc. (Lioncrest), protests the rejection of its bid as nonresponsive and the award of a contract to Sunstate International Management Services, Inc. (Sunstate), under invitation for bids (IFB) No. N62467-85-B-2924 issued by the United States Navy.

The IFB, a small business set-aside, is for housing grounds maintenance at the United States Naval Air Station, Mayport, Florida. Lioncrest's bid was rejected as nonresponsive because it did not include a unit price schedule for the indefinite-quantity work under the contract. The protester primarily contends that it should have been allowed to correct the omission because it was a minor irregularity and the awardee was allowed to correct an error in its bid.

The protest is denied in part and dismissed in part.

The solicitation required bids on two items. The first item was a total price for the definite-quantity portion of the work to be performed. The second item was a total price for indefinite-quantity work. With regard to the indefinite-quantity work, the solicitation included a schedule which listed 28 different types of indefinite-quantity work, an estimated quantity for each, and provided spaces to enter unit prices, extended prices and a total price. The IFB required that the total price for each type of work on the schedule was to be arrived at by multiplying the unit price by the estimated quantity for each type of work and the total price for the indefinite-quantity work was to be obtained by adding up the totals. Lioncrest submitted a total price for the indefinite-quantity work, but failed to include the indefinite-quantity work schedule. Thus, there were no unit prices or item totals in its bid--only the total price.

Lioncrest contends that its failure to submit the indefinite-quantity work schedule with its bid should not have rendered its bid nonresponsive. It claims that the solicitation includes contradictory provisions whether or not submission of the schedule with the bid is required and, therefore, its failure to submit the schedule is at most a minor irregularity. Lioncrest further maintains that the omission was minor because it did not affect its price,

quantity or quality of work and it is still obligated to perform all of the work under the contract. It concludes that, since this is a minor defect, it should have been given the opportunity to cure this defect during the preaward survey or after award.

As an initial matter, the solicitation does not contain contradictory provisions as alleged. The IFB specifically states under the provision "Items of Bid" that for bid item one, the definite-quantity work, "Bidders are not to submit a completed Schedule of Deductions with their bids," while it states for bid item two, the indefinite-quantity work, that "BIDDERS ARE TO SUBMIT A COMPLETED SCHEDULE OF INDEFINITE QUANTITY WORK WITH THEIR BIDS." The instruction not to submit a schedule of deductions for definite-quantity work with bids was repeated twice in section 5, paragraph 33, "Schedule of Deductions." Lioncrest apparently was confused by a reference in that section to indefinite-quantity work and the "Schedule for Indefinite Quantity Work." That schedule, however, differs from the "Schedule of Deductions" which applies to definite-quantity work in the event the contractor fails to perform it or unsatisfactorily performs it and, as stated in this section of the IFB, was not to be submitted with bids. No provision of the IFB states or even suggests that the schedule for indefinite-quantity work is not to be submitted with bids. Thus, the IFB clearly requires that the schedule for indefinite-quantity work be submitted with bids.

We have previously held in cases concerning similar Navy solicitations that unit prices for the indefinite-quantity portion of the solicitation must be established at bid opening because, in an indefinite-quantity-type contract, the individual work requirements are to be purchased by the issuance of work orders as the needs arise. Thus, while the total price is needed to determine the low bid, unit prices for each item are material terms of the contract which must also be established at bid opening. Garrett Enterprises, Inc., 59 Comp. Gen. 754 (1980), 80-2 C.P.D. ¶ 227, aff'd, Garrett Enterprises, Inc.--Reconsideration, B-196659.2, Feb. 6, 1981, 81-1 C.P.D. ¶ 70.

Further, failure to submit the unit price schedule at bid opening leaves the bidder with no real obligation based on the bid as submitted to perform any item of work at any particular price. To allow Lioncrest to submit its schedule containing unit prices after bid opening would give that firm an option not afforded any other bidder to accept or reject an award after bids were opened and prices exposed, merely by deciding whether or not to submit a completed

schedule. Quality Controls, Inc., B-215003, Sept. 18, 1984, 84-2 C.P.D. ¶ 316. It is fundamental that the responsiveness of a bid must be established on the basis of the bid submitted at bid opening. Fire & Technical Equipment Corp., B-192408, Aug. 4, 1978, 78-2 C.P.D. ¶ 91.

Since the unit price schedule for the indefinite-quantity work goes to the substance of the bid and was clearly material, Lioncrest's failure to timely submit the schedule cannot be waived or cured after bid opening. Space Services of Georgia, Inc., B-214499, Aug. 15, 1984, 84-2 C.P.D. ¶ 183; see Federal Acquisition Regulation, 48 C.F.R. § 14.405 (1984). Lioncrest's bid was thus nonresponsive and properly rejected.

Lioncrest next argues that it should have been allowed to correct its bid because Sunstate was allowed to correct its bid after bid opening. Included as part of Sunstate's bid was a standard certification concerning each bidder's size status. Sunstate certified in its bid that it was not a small business concern. After bid opening, Sunstate informed the contracting officer that it had made a mistake in its certification and that it was a small business. A small business size status determination had been made by the Small Business Administration in 1984. Therefore, the Navy considered Sunstate to be a small business firm.

Lioncrest believes that, if Sunstate's corrected bid properly can be accepted, equal treatment of bidders mandates that it should have been allowed to correct its bid also. Lioncrest further asserts that, if it is not allowed to correct its bid, Sunstate should not have been allowed to change its bid after bid opening and, consequently, should have been ineligible for award because Sunstate certified itself to be a large business.

Sunstate's failure to correctly certify its status as a small business did not render its bid nonresponsive. To be considered responsive, a bid must constitute an unequivocal offer to provide the required product or service in conformance with the material terms and conditions of the solicitation. Mobile Drilling Company, Inc., B-216989, Feb. 14, 1985, 85-1 C.P.D. ¶ 199. Here, there is no question concerning Sunstate's obligation to provide the required maintenance services in accordance with the material terms and conditions of the solicitation. Rather, the only question which exists is whether Sunstate is a small business under the size standards established by the Small Business Administration. See 13 C.F.R. § 121.1, et seq. (1985).

This question relates solely to Sunstate's status and its eligibility for award under the set-aside and does not reflect upon Sunstate's commitment to provide the required maintenance services. Therefore, it does not involve a matter of responsiveness. Beta Construction Company, B-216176, Dec. 11, 1984, 84-2 C.P.D. ¶ 648. Consequently, Sunstate's bid was responsive and the Navy properly permitted Sunstate to correct its certification, see Timberland Paving & Construction Co., B-205179, June 21, 1982, 82-1 C.P.D. ¶ 608, while, as discussed above, the Navy properly did not permit Lioncrest to correct its material omission and rejected Lioncrest's bid as nonresponsive.

In its comments on the agency report, Lioncrest contends for the first time that it considers Sunstate to be other than a small business because of an affiliation with another large concern and that it was not provided with an opportunity to protest the small business size before award.

Protest arguments not raised in a protester's initial submission must independently satisfy the timeliness requirements of the Bid Protest Regulations, 4 C.F.R. part 21 (1985). Where the protester supplements its protest with a new ground of protest in its response to the agency report more than 10 days after the basis for the new argument should have been known, the new ground is untimely. Radionic Hi-Tech, Inc., B-219116, Aug. 26, 1985, 85-2 C.P.D. ¶ 230. As the argument raised by Lioncrest in its comments concerns a matter that it should have been aware of at least 6 weeks earlier when it protested the award after learning that the award had been made to Sunstate after Sunstate was allowed to change its size status, that argument is untimely and will not be considered.

Lioncrest also states that its bid is about \$150,000 lower than that of Sunstate so the government should have allowed it to correct its bid and awarded the contract to Lioncrest to save money. In order to maintain the integrity of the competitive bidding system, explanations or modifications after bid opening cannot be used to make a nonresponsive bid responsive even if, as here, the government could obtain a lower price by accepting the corrected bid. Central States Bridge Co., Inc., B-219559, Aug. 9, 1985, 85-2 C.P.D. ¶ 154; Hanson Industrial Products, B-218723 et al., May 9, 1985, 85-1 C.P.D. ¶ 521.

Finally, Lioncrest's allegation that its bid was rejected because of bias fails because we have found that the proper application of procurement principles required Lioncrest's bid to be rejected as nonresponsive.

fu *Seymour Efron*
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General Counsel